

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARSO CONSTRUCCION DE PUERTO
RICO, LLC

Employer

and

COMMUNICATIONS WORKERS OF
AMERICA

Petitioner

CASE NO. 12-RC-127828

**CARSO'S OPPOSITION TO UNION'S REQUEST FOR REVIEW OF
REGIONAL DIRECTOR'S DECISION AND ORDER**

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TO THE HONORABLE BOARD:

COMES NOW Carso Construcción de Puerto Rico, LLC., ("Carso") through counsel, and very respectfully submits this Brief in Opposition to the Request for Review filed by the Communication Workers of America (hereinafter "the Union" or "CWA") and in support of the Decision and Order issued in this case by the Acting Regional Director of Region 12, Gary W. Muffley. The Regional Director held that the Installers at issue in this case are independent contractors and not employees as defined in Section 2(3) of the Act and therefore he dismissed the representation petition filed by the CWA.

I. INTRODUCTION

The Union alleges that the Decision and Order was not based upon the entirety of the record and claims that it has submitted sufficient evidence to show that the Installers are employees and not independent contractors. It further contends that the two managerial witnesses presented

by Carso did not have specific knowledge of the day to day work of the Installers and that the two witnesses it presented allegedly had such knowledge.

These contentions are rather startling insofar as the Union seems to overlook the fact that the managerial witnesses did not have specific knowledge of the Installers' day to day work **precisely because the Installers are independent contractors and Carso does not exercise direct control over their work.** In addition, the two witnesses presented by the Union were both deeply flawed. Jesús D. Benítez Burgos (Benítez) worked for about a month as an Installer (Hearing Transcript, hereinafter "Tr." p. 213, 220 and 225), while the other witness Ruben Meléndez (Meléndez) is a disgruntled former employee who worked at Carso for approximately 6 months and was fired (Tr. p. 267, 330 and Union Exhibit 8). Both Union witnesses provided vague and contradictory testimony that did not support the Union's contentions.¹

The Union alleges that the Regional Director should have interpreted all vague and confusing factual information against the Company even though the confusion was caused by the Union's own witnesses. It is absurd to suggest that a party can submit faulty information at a hearing and then expect the opposing party "to bear the burden of proof" on those issues as the Union pretends. While it is correct that the Company bears the burden of proof in this case, said burden does not require that the Regional Director accept all the evidence submitted by the Union no matter how illogical, contradictory and biased it may be. The Regional Director's job is to separate the wheat from the chaff and that involves making credibility and factual determinations from the evidence submitted by both parties. That the Company bears the burden of proof does

¹ Some of the issues in which the Union witnesses provided vague and contradictory testimony include whether the Installers are required to wear a Company uniform; whether the Installers are required to use Company logos in their vehicles and who furnishes and pays for the logos; whether the Company provides safety equipment to some or all of the Installers.

not mean that the Regional Director must accept all the evidence submitted by the Union at face value without considering whether it is contradictory and unlikely.

In its Request for Review the Union failed to identify on which of the grounds for granting a request of review described in the regulation 29 CFR § 102.67 it is basing its request. While the Union points to numerous factual determinations by the Regional Director with which it disagrees, it is unable to specify any decision by the Regional Director on **a substantial factual issue which is clearly erroneous on the record** and which prejudicially affected its rights as required by the regulations. In fact, the Union's Request is entirely composed of quibbles and disagreements with the Regional Director's factual and credibility determinations. The Union is unable to show any substantial factual issue in the Decision and Order that is clearly erroneous on the record. If the standard for granting review is interpreted as merely requiring that a party disagree with the Regional Director's factual and credibility determinations, then all such requests would have to be granted, since it is unlikely that a losing party will ever agree with all factual determinations made by a Regional Director.

II. PROCEDURAL BACKGROUND

On May 2, 2014, the Communications CWA filed a representation petition seeking to represent all full-time and part-time Installers employed by Carso at its Toa Baja, Puerto Rico facility.

On May 21, 2014, during the second day of hearing, the Union amended the Petition to include all full-time and part-time Installers employed by the Employer, Carso, at its facility in Toa Baja, Puerto Rico and throughout the Island of Puerto Rico. (Tr. at page 23-24)

The hearing was held on May 19, 21, 30 and June 5 and 6, 2014. The Decision and Order was issued on June 16, 2014 and the Union filed its Request for Review on June 23, 2014.

III. ARGUMENT

We will not address each and every factual decision challenged by the Union, but will briefly address some issues that we believe merit clarification:

A. INSTALLERS' USE OF HELPERS

The Regional Director found that the Installers have discretion to use helpers to assist in the performance of their work and that the Company is not involved in their use of helpers. (Regional Director's Decision and Order, hereinafter "RDDO" page 9-10). The Union claims this is untrue because, in order to make an installation for Carso, the installers needed to be approved by Claro and because there is no evidence of Carso approving any such helpers. Claro did have to approve Carso's Installers. However, it does not follow from that fact that Claro or Carso also have to approve the helpers the Installers choose to employ. In those cases where Installers hire them, helpers merely assist the installers. The helpers do not replace the Installer and do not work independently from them. Claro only approves Installers, and helpers are not Installers. Therefore, the Installers do not need Carso or Claro approval to employ a helper.

Moreover, the Independent Employment Contract is solely between Carso and the installer. There is no limitation in the contract or anywhere else on the Installer being able to employ helpers. (Employer Exhibit 2 and RDDO at page 3) The Installer signs the contract and the Installer is responsible for the work performed. This does nothing to preclude an Installer from employing helpers and thereby being able to accomplish more work and benefiting financially from their help.

B. INSTALLERS' USE OF CLARO MANUAL

The Union claims that the alleged use of the Claro Manual by the Installers is an indication that Carso controls the work of the Installers. First, we must note that the testimony by the Union's witnesses regarding the Manual was vague and confusing. It is not clear whether all or

just some of the Installers received the said Manual or how it was used, if at all, by the Installers. In any case, as the Regional Director correctly noted there is no evidence that the Installers are disciplined for not following the Manual or that Company considers such failure in referring future work orders. (RDDO at page 8) Carso is not aware of the methods or techniques used by the different Installers in performing the installations since Carso does not supervise the Installers' work on a day to day basis. The Company inspects 10% of the installation orders after they have been completed. (Tr. p. 138-139) The Company only checks the final result of the installation for quality control purposes. In addition, if an inspection finds that the installation was not properly done, the Installers are not disciplined or admonished. They are merely requested to correct the work. (RDDO at page 8 and Tr. p. 166-167) Thus, the evidence shows that Carso exercises no control over the installation process nor over the methods to achieve the installations.

C. INSTALLERS ARE NOT SUPERVISED

The Regional Director found that Union witness Melendez, who worked as an Inspector at Carso for six months was not a supervisor under the Act. On page 4, footnote 7 of the Decision, the Regional Director stated:

Melendez Ramos testified that he was an Inspector Supervisor. While the Petitioner contends throughout its brief that Ramos was a supervisor, no testimony was elicited to establish that Ramos met any of the supervisory indicia as articulated in Section 2(11) of the Act.

This finding was not challenged by the Union in its Request for Review. In fact, it would have been very difficult to challenge the finding that Melendez is not a supervisor, since none of the activities he carried out are of a supervisory nature. From his own testimony, he spent his time, against Company instructions, in driving around his assigned area delivering and fetching things, including materials, pre-invoices and checks and opening remote jumpers and remotes. (Tr. p. 276 and 287 and Employer Exhibit 14) Those are not the acts of a supervisor.

The admitted fact that Melendez is not a supervisor further reinforces the determination that the Installers are independent contractors. The managerial employees, as the Union itself acknowledged, are not very knowledgeable about the Installers day to day work, the Inspectors are also admittedly not supervisor, so who supervises these 33 alleged employees? **The lack of direct supervision is a clear indication of the independent contractor status of the Installers.**

D. INSTALLERS ARE NOT SUBJECT TO DISCIPLINE BY CARSO

One of the factors that the Regional Director considered significant was the absence of any disciplinary action against the Installers. (RDDO at page 9) The Union attempts to get around this fact by claiming that just because there is no evidence that the Company has ever disciplined the Installers it does not follow that it can not do so at some future time. This is a circular argument. The Company can not prove a negative about an hypothetical situation that the Union alleges may happen in the future. The Regional Director, as well as the Honorable Board, must decide matters based on the present facts, not on imaginary future events.

E. INSTALLERS EXERCISE ENTREPRENEURIAL CONTROL OVER THEIR WORK

As correctly found by the Regional Director, the Installers do exercise entrepreneurial control and can take action to increase their income. The Installers can accept more work orders, can hire helpers to complete more installations and can choose to work outside their area. The Regional Director found that Carso does not restrict how many work orders the Installers can receive per day, week or month. Moreover, the Regional Director also found that the Company has no right to unilaterally implement changes to the contract. (RDDO at page 13)

The Union cited the case of Lancaster Symphony Orchestra, 357 NLRB No. 152 (2011), which the Regional Director easily distinguished, pointing out that the case is not applicable to the

facts in this case because in Lancaster, supra, the musicians did not bear any entrepreneurial risk of loss. In our case, the Installers bear the risk of loss in two ways. If the Installers perform a faulty installation and are not able to fix it, they will not receive any pay. (Tr. p. 166-167) In addition, if they decide to perform work outside their area, they must consider the cost of gas and wear and tear on their vehicles. (RDDO at pages 10-11)

Furthermore, the evidence shows that some Installers undertake other work, such as working as an electrician and even working for Carso competitors. (RDD at pages 6-7, Tr. p. 162-165)

F. INSTALLERS DO NOT HAVE A SET SCHEDULE

The Union insists that Carso exercises control over the Installers by pointing out to Meléndez' testimony that he was required to call the Installers to make sure that they were at their first job by 8:00 am. (Tr. p. 278) From this, the Union tries to allege that Carso supervised the Installers' work and that they had a set schedule. This is incorrect. First of all, Meléndez also testified that he did not have a set schedule (Tr. p. 330), which is rather contradicted if he was really required to call the Installers every day at the same time. In addition, there is no evidence on record to show that the Installers had to work a set number of hours or that they were disciplined if they were not working at 8:00 am. (RDDO at page 9) In fact, Meléndez did not testify at all regarding what was supposed to happen if any of the Installers was not at work by 8:00 am.

The Union tries to make bricks without straw by alleging that the Company requires the Installers to submit the pre-invoice on a specific day, which the Union interprets as exercising control over the Installers. However, the Union's own witness, Meléndez, testified that he had received pre-invoices on other days. (Tr. p. 336-337) Getting the pre-invoices in early might allow Carso to bill Claro for the work, and to compute the amounts owed to the Installers, so it was

mutually beneficial to both parties. Nevertheless, that does not mean, and nowhere in the record is shown, that Installers were required to submit pre-invoices on a specific day. (Tr. p. 56) When to turn in the pre-invoices remained, at all times, at the discretion of the Installer.

G. OTHER UNION CONTENTIONS

While the Union's Request for Review includes many challenges to the Regional Director's factual determinations, we will briefly touch in a few that we find surprising:

1. The Union claims that the installers have no discretion as to the place where they will be conducting the installation since Carso gives out the order with the address. Obviously, the place where the installation will be performed is determined by the Claro clients who request one, something over which Carso has not control. Is the Union suggestion that the Installers should perform installations for people who are not Claro's clients and who have not requested them?
2. The Union claims that Carso "covered all expenses" for the training taken by Benítez. There was no testimony at the hearing about these alleged expenses. What is clear is that Benítez was not paid for his time by Carso. (Tr. p. 192 and 213)
3. The Union claims that the evidence shows that the Installers' work is "permanent" and that they have performed thousands of installations. There was no evidence at the hearing showing that the Installers' work is permanent. Obviously, the relationship between the Installers and the Company will continue as long as it is mutually beneficial, which does not mean that it is permanent. The number of installations performed is irrelevant to the issue of whether the Installers are employees or independent contractors.

V. CONCLUSION

The Regional Director correctly found that the Installers are engaged as independent contractors, perform their work without Company supervision, provide their own tools and vehicles, can choose the work they wish to perform, have opportunities to increase their earnings by hiring helpers or accepting work outside their area, can and do perform other work and are not subject to Company disciplinary action.

In its Request for Review the Union was unable to specify any determination by the Regional Director, on **a substantial factual issue, which is clearly erroneous on the record** and which prejudicially affected its rights. Therefore, the Union has failed to meet the requirements for a grant of review by the Honorable Board.

WHEREFORE, it is respectfully requested that this Honorable Board deny Petitioner's Request for Review and uphold the Regional Directors Decision and Order as the Installers are clearly independent contractors and not employees of Carso and can not organize collectively as employees under the Act.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico for Washington, DC, this 30th day of June, 2014.

CERTIFICATION: I hereby certify that a copy of this Opposition has been sent by e-mail to all parties.

/s María Isabel Rey

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